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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. [redacted] 106

MARY E. DOYLE, Widow, and ANNIE E. DOYLE,
Mother of
BERNARD C. DOYLE,
Deceased,

Petitioners,

vs.

THE LORD BALTIMORE HOTEL COMPANY,
Employer
and
LIBERTY MUTUAL INSURANCE COMPANY,
Insurer,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

OPINION BELOW

The opinion of the Court of Appeals of Maryland (15-18)* has not as yet been officially reported in the Maryland Reports. However, this opinion, which was filed on March 10, 1949 (87), has been published in 64 A. 2d 557.

* All page references, unless otherwise indicated, are to the printed transcript of record.

The memorandum opinion of the Baltimore City Court (Sherbow, J.), the intermediate tribunal, appears at pages 9 to 14 of the transcript, and the decision of the State Industrial Accident Commission of Maryland, the tribunal of first instance, also appears in the transcript, pages 1 and 2.

II.

JURISDICTION

Respondents respectfully submit that there is no proper basis for the attempt of the petitioners to invoke the jurisdiction of this Court as no federal question was seasonably raised in the state courts. It is apparent from the record that it was not until after the decision of the Court of Appeals of Maryland had been filed on March 10, 1949, that, for the first time, an assertion was made by the petitioners that the case involved a question pertaining to their rights guaranteed by the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. This assertion was made by a motion for reargument (19-86), filed on April 9, 1949, and overruled without opinion on April 26, 1949 (87).

Respondents further submit that, in any event, the case presents no such substantial federal question as, even if seasonably raised, would justify this attempt to invoke the jurisdiction of this Court. A review of the subject matter with which this case deals and of the state statutes and judicial decisions it concerns clearly reveals that the assertion that the petitioners have been denied equal protection of the laws in contravention of the Fourteenth Amendment is without foundation in fact or law.

A more detailed discussion of these considerations relating to jurisdiction appears under heading V, Argument, at page 6 of this brief.

III.

STATUTES INVOLVED

This case involves a claim for compensation benefits under the Workmen's Compensation Act of Maryland (Article 101, Code of Public General Laws of Maryland). As the injury occurred on June 12, 1947 (5), the provisions with which the case is chiefly concerned are those contained in Flack's 1947 Cumulative Supplement to the Annotated Code of Maryland, pages 1891 to 1969, inclusive.

The Maryland statute is a compulsory compensation act. It provides for the payment of benefits in two main classes of cases, an enumerated schedule of occupational diseases contracted due to specified causes involving exposures to injurious substances (Article 101, Sections 21 to 30, incl.), and disabilities resulting from accidental injury "arising out of and in the course of * * * employment" (Article 101, Section 14).

Among the various classes of disability due to accident covered by the Maryland Act is permanent partial disability, which is particularly covered by Article 101, Section 35, Subsections (3), (4) and (5). These provisions set up a schedule of amounts to be paid for the loss or loss of use of various specified members of the body, provides compensation for other permanent partial disabilities of a similar character but not specifically covered in the schedule, provides for compensation for disfigurements, and, in Subsection (5), special provision is made for claims involving herniæ and their consequences.

The subsection dealing specifically with hernia cases, Section 35 (5), Article 101, Flack's 1947 Cumulative Supplement, is as follows:

"(5) In all claims for compensation for hernia, compensation may be allowed only upon definite proof to the satisfaction of the Commission:

"First. That there was an accidental injury causing hernia, arising out of and in the course of the employee's employment; or that the claimant sustained a hernia resulting from a strain arising out of and in the course of his or her employment.

"Second. That the hernia did not exist prior to the injury or strain for which compensation is claimed; provided that if as the result of an accidental injury, or as the result of a strain, arising out of and in the course of the employee's employment a pre-existing hernia becomes so strangulated that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply.

"Third. That, anything in this Article respecting notice to the contrary notwithstanding, such injury or strain was reported to the employer within fifteen days next following its occurrence.

"All hernia, inguinal, femoral or otherwise, so proven to be the result of such injury or strain, shall be treated in a surgical manner by operation whenever practicable. If death results from such operation, the death shall be considered as a result of the injury or strain, and compensation paid in accordance with the provisions of this section. In non-fatal cases, time loss only shall be compensated, provided, however, that in computing lost time there shall not be included any time lost from delay in the holding of a hearing when such delay shall have been occasioned at the request, or by the fault, of the claimant, unless it is shown by special examination that the injured employee has a permanent partial or permanent total or temporary total disability resulting from the operation. If so, compensation shall be paid in accordance with the provisions of this Article, with reference to perma-

nent partial disability or permanent total or temporary total disability as the case may be.

"In case the injured employee refuses to undergo an operation for the cure of the said hernia he shall be allowed compensation for a period of seven and one-half (7½) weeks, and if it be shown to the satisfaction of the Commission that because of age or previous physical condition, it is considered unsafe for the employee to undergo such operation, such refusal may be excused by the Commission, in which event the employee shall be allowed compensation for the period of actual disability resulting from such hernia, not to exceed fifty-two (52) weeks, and in either event such payment shall be in lieu of all benefits for or on account of disability or death resulting or alleged to have resulted from such injury."

IV.

STATEMENT OF THE CASE

The facts in this case are undisputed and are stipulated (4-8).

About four years prior to June 12, 1947, petitioners' decedent developed a post-operative ventral hernia, non-occupational in origin. The hernia gradually became enlarged during the two years immediately following its inception but the decedent elected not to have it corrected by surgery.

On June 12, 1947, while at work, the decedent fell, striking this pre-existing hernia which then became swollen and painful. On the advice of his family physician, the decedent arranged for an operation to correct the hernia. The operation was performed on June 21, 1947, and, about half an hour after the operation, the decedent underwent a fatal cardiac collapse.

It is uncontested that there was no strangulation of this pre-existing hernia. In fact, strangulation of a ventral hernia, due to its structure and location, is stated at page 6 of the petition in this case to be "physiologically impossible".

Claim for compensation benefits for dependency was filed with the State Industrial Accident Commission of Maryland. Following a hearing, the Accident Commission found, on issues raised under the provisions of Article 101, Section 35 (5), that, while the decedent had sustained an accidental injury, his hernia had pre-existed the accident and had not become so strangulated as to require an immediate operation. Therefore, it found that the claim was not compensable (1-2).

A statutory appeal under Article 101, Section 57, was prosecuted on behalf of petitioners to the Baltimore City Court. There the case was tried on an agreed and stipulated statement of facts (3, 4-8) and the decision of the Accident Commission was reversed (3, 9-14).

Respondents thereupon filed an appeal to the Court of Appeals of Maryland (3, 87) under Article 101, Section 57. On March 10, 1949, the Court of Appeals reversed the judgment of the lower court, and its opinion (15-18) was filed on the same date (87).

Petitioners, on April 9, 1949, filed motion for reargument which, on April 26, 1949, was overruled by the Court of Appeals without opinion (87).

V.
ARGUMENT

There is no proper basis for petitioners' attempt to invoke the jurisdiction of this Court as:

A. No federal question was raised in the state courts until the motion for reargument was filed following the

rendition of the decision by the Court of Appeals of Maryland, the state court of last resort; and

B. No substantial federal or constitutional question is involved in this case as the state statute, in establishing the various requirements for the compensability of claims involving herniæ, does not deny equal protection as it bases its distinctions upon considerations of factual difference and establishes classifications which need and experience have demonstrated to be reasonable and proper and relevant to the purposes of the legislation; and

C. Even if the special proviso of the statute were invalid, as petitioners assert, the general statutory provision excludes petitioners' claim; and

D. Equal protection of the laws is not denied by the abolition of a common law remedy.

Point A

There is no proper basis for petitioners' attempt to invoke the jurisdiction of this Court as the federal question was not seasonably raised in the state courts below.

Petitioners, seeking to invoke the jurisdiction of this Court to review the decision of a state court of last resort, alleging that the state court's decision has deprived them of equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States have the burden of demonstrating by the record that such a question was seasonably raised in the state court below. *Crowell v. Randell*, 10 Pet. 368; *Railroad Co. v. Rock*, 4 Wall. 177, 180; *Olympia Mining Co. v. Kerns*, 236 U. S. 211, 215; *Rooker v. Fidelity Trust Co.*, 261 U. S. 114, 116; *McGarrity v. Delaware River Bridge Comm.*, 292 U. S. 19, 20; *Bailey v. Anderson*, 326 U. S. 203, 207.

An examination of the record in this case fails to disclose that any contention as to the alleged denial of equal protection was made prior to the decision of the Court of Appeals of Maryland on March 10, 1949 (87), except for the bare, unsupported statement in the motion for reargument, subsequently filed in that Court, that during oral argument, counsel had stated that if the hernia provision (Article 101, Section 35 (5)) were interpreted as denying compensation in this case, "the provision would be unconstitutional" (27).

Even assuming that such contentions were made in oral argument addressed to the court below, "* * * if the record does not show that they were necessarily drawn in question, this Court cannot take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument" (*Railroad Co. v. Rock*, 4 Wall. 177, 180). And, in any event, where the claimed federal question is a constitutional one, the specific provision of the Constitution must be cited below. A mere general claim of unconstitutionality is not sufficient to satisfy the requirement that the federal questions have been presented to the state court. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *New York Central Etc. R. Co. v. City of New York*, 186 U. S. 269; *Harding v. Illinois*, 196 U. S. 78; *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36; *Herndon v. Georgia*, 295 U. S. 441.

The record shows that a federal or constitutional question was first specifically raised in this case in the motion for reargument (19-86) filed in the Court of Appeals of Maryland almost a month after its decision (87). This motion was overruled without opinion (87). Except under extraordinary circumstances of a character not present herein, a federal claim first asserted in a motion for reargument

filed in a state court is raised too late to serve as a basis for seeking review of the state decision by this Court. *Godchaux Co. v. Estopinal*, 251 U. S. 179, 181; *American Surety Co. v. Baldwin*, 287 U. S. 156, (No. 3), 162-164; *Herndon v. Georgia*, 295 U. S. 441, 443.

It is, of course, well recognized that if the state court, after final judgment, actually entertains a motion for reargument wherein the federal question is first asserted and decides the point, the question is no longer foreclosed and may be raised in seeking to invoke the jurisdiction of this Court. See *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, and cases cited therein. However, there is nothing in the record in this case to show that the Court of Appeals actually entertained and decided the asserted constitutional questions. It overruled the motion for reargument without opinion (87).

In a letter to counsel for petitioners, the Clerk of the Court of Appeals stated "that the Court has considered your motion * * * and has overruled the motion under date of April 26, 1949" (87). It is to be noted that this is not a statement or opinion of the court, itself, but, even if so considered, statements that a state court has "considered" or "maturely considered" or given "due consideration" to a motion for reargument wherein federal questions are for the first time raised do not suffice to show that the court has passed on the question. They merely constitute a denial of the motion. *McCorquodale v. Texas*, 211 U. S. 432; *Forbes v. State Council of Virginia*, 216 U. S. 396, 399; *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 334; *St. Louis & San Francisco R. Co. v. Shepherd*, 240 U. S. 240, 241.

If it can be demonstrated that a federal or constitutional question first arose at the close of the proceedings in the

state court, such as by its sudden and unanticipated action in reversing itself on a procedural matter, thus debarring a litigant to an opportunity to present his case, as in *Saunders v. Shaw*, 244 U. S. 317, 320, or by unexpectedly reversing its previous construction of a statute or regulation, thereby for the first time threatening a litigant's rights under the federal Constitution, as in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 678; *Great Northern Ry Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 367; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, the new and unexpected grounds for assertion of a federal question may be first raised in a motion for reargument. Under such circumstances, their assertion is not unseasonably made.

Apparently, petitioners principally rely on this exception to the general rule in seeking to invoke the jurisdiction of this Court. They insist that, prior to the entry of judgment of the Court of Appeals on March 10, 1949, they confidently relied on the assumption that the hernia subsection (Article 101, Section 35 (5)), although it specifically stated that a claim involving a pre-existing hernia would be compensable only if it were shown that the accidental injury or strain caused a strangulation requiring an immediate operation, had no application to the present case. It is admitted that this case involves a non-strangulation pre-existing hernia. The petitioners assert, however, that it was their belief that this section applied only to render such strangulation compensable, while, on the other hand, simple aggravation of a pre-existing hernia was compensable "under the general provisions of the act * * *" (petition, p. 4). This interpretation, they further allege, was the law of Maryland as declared by the Court of Appeals in *G. L. Baking Co. v. Wickham*, 1940, 178 Md. 381, and they cite particularly the language of that decision at page

388, where it was stated that the claim, which was held compensable, involved an accident which "accelerated an existing rupture or developed a strangulated hernia". Furthermore, they say, this interpretation was confirmed by the citation of the *Wickham* case and quotation of the language noted above in *Bethlehem Steel Co. v. Ziegenfuss*, 1946, 187 Md. 283, 287. Therefore, it is petitioners' contention that the decision of the Court of Appeals in the present case was a totally unexpected reversal of the previously declared applicable law and, that they could not have anticipated such an outcome, with its alleged infringement of their constitutional rights, in time to have asserted the federal question more promptly than in a motion for reargument.

Respondents submit that this line of argument is completely without legal foundation. The *Wickham* case, 178 Md. 381, involved a claim for a strangulated hernia which developed following an injury. It was shown that the employee had a soreness or predisposition to hernia before the accident. The applicable statutory requirements of compensability, in that case, as embodied in the Session Laws of Maryland, 1935, Chapter 487, were substantially the same, as far as pre-existing herniæ were concerned, as those applicable here. Therefore, this case actually decided that, under a statute providing that a pre-existing hernia caused to strangulate by reason of an accidental injury was compensable, a claim meeting these requisites was compensable. The case was not concerned with, hence could not be authority for the compensability of a simple aggravation of a pre-existing hernia.

In November, 1946, over six months before the accidental injury in the present case, and almost two years before the appeal was taken to the Court of Appeals of Maryland, that tribunal handed down its decision in *Bethlehem Steel Co.*

v. Ziegenfuss, 187 Md. 283. The facts in the *Ziegenfuss* case were strikingly similar to those herein for that case involved a claim for an aggravated pre-existing condition, variously diagnosed as a relaxed muscle or post-operative hernia. The employee had fallen at work and thereafter the pre-existing lump became enlarged and painful. It was then found that the employee had an unstrangulated hernia.

The Court of Appeals, in the *Ziegenfuss case* (supra), carefully reviewed the background of the applicable hernia provision (the same as was involved in the *Wickham* case (supra) and substantially the same as applicable herein), pointing out that "cases involving hernia constitute an exception to the usual type of cases under the Workmen's Compensation Act" (187 Md. 283, 286). They are exceptions to the general rule, said the court, because of the special statutory prerequisites to compensability of such claims, including the requirement that it be shown that the hernia, if unstrangulated following the injury, was not a pre-existing condition (187 Md. 283, 289). Since this requirement had not been met, the claim was held non-compensable.

The factual background and the decision in the *Ziegenfuss* case (supra) have been reviewed at some length herein because of the obviously direct and controlling authority of that decision on the claim prosecuted by the petitioners in the tribunals below. Here, not only was it not shown that the hernia was not pre-existing, but it was uncontested that it had existed before the injury and was not thereby caused to strangulate. As the Court of Appeals of Maryland stated, the contention of the petitioners that the statutory provision did not apply to a mere aggravation, without strangulation, of a pre-existing hernia, was "foreclosed by our recent decision in *Bethlehem Steel Co. v. Ziegenfuss* (supra)" (17).

In view of the clear language of Article 101, Section 35 (5), particularly as it had been construed and applied in the *Ziegenfuss* case (supra) two years before the present case came before the Court of Appeals, it is perfectly apparent that the Court of Appeals, in applying the statutory provision and following its *Ziegenfuss* decision was inaugurating no new and startling departure from established precedents. On the contrary, it was following a clearly stated and well established authority. There was, then, no such new construction of the statute unexpectedly announced such as is claimed to have caused an unanticipated threat to constitutionally guaranteed rights. If such rights are threatened, the possibility of such infringement was as apparent before the Court of Appeals handed down its decision as it was thereafter.

Herndon v. Georgia, 295 U. S. 441, involved a contention similar to that urged by the petitioners herein. No specific federal question was raised until after the state court of last resort had decided the case, following the authority of a prior decision handed down before the *Herndon* case came before that court. A motion for rehearing was thereafter filed on Herndon's behalf, asserting that the statute as construed violated his rights guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the question was raised too late, that the outcome of the proceedings could not be claimed to be unanticipated for ignorance of the prior decision could not be pleaded. Herndon "* * * was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review hereby appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, * * *" (295 U. S. 441, 446).

The parallel between the contention of petitioners herein and that discussed in the *Herndon* case is too obvious to require comment.

It is submitted, therefore, that a federal question was not seasonably raised in this case and, accordingly, that there is no proper basis for petitioners attempt to invoke the jurisdiction of this Court.

POINT B

No substantial federal or constitutional question is involved in this case. The state statute, alleged to infringe the guarantee of equal protection, validly establishes requirements for compensability of claims involving herniae, basing the statutory distinctions upon factual differences.

The classification is reasonable and proper in the light of need and experience and is relevant to the purposes of the legislation.

Respondents respectfully submit that there is no such federal or constitutional question presented herein to justify this attempt to invoke the jurisdiction of this Court.

The state statute, which is attacked as repugnant to the equal protection clause of the Constitution of the United States, by its specific terms and as construed by the Court of Appeals of Maryland, classifies compensation claims involving hernia as in a category separate and distinct from other classes of cases arising under the general provisions of the statute (Article 101, Section 35 (5); *Lloyd v. Webster*, 165 Md. 574; *Ross v. Smith*, 169 Md. 86; *Bethlehem Steel Co. v. Ziegenfuss*, 187 Md. 283). Specifically differentiated from other types of cases arising under the Workmen's Compensation Act, claims involving herniæ are subject to three definite prerequisites or conditions to test their compensability. Petitioners herein assert that one of these special

conditions, that requiring proof that the hernia did not exist before the injury or strain or, if admittedly pre-existent, that it be shown to have become so strangulated by reason of such accident or strain as to require an immediate operation, is unreasonable, arbitrary and operates to deny to them equal protection of the laws.

The mere fact that legislation classifies or establishes categories in the subject matter with which it deals obviously does not render it objectionable upon constitutional grounds. *Radice v. New York*, 264 U. S. 292, 296. This Court, in passing upon the validity of state workmen's compensation legislation, in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576 and 577, said:

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond legislative authority. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them and what shall be excluded."

See also: *New York Central R. R. Co. v. White*, 243 U. S. 188; *Hawkins v. Bleakley*, 243 U. S. 210; *Mountain Timber Co. v. Washington*, 243 U. S. 219; *Cudahy Packing Co. v. Parramore*, 263 U. S. 418; *Lower Vein Mining Co. v. Industrial Board*, 255 U. S. 144.

A statutory classification is not "arbitrary and unreasonable" if it makes distinctions between matters which are dissimilar. State legislatures may set apart classes and

types of problems according to requirements or considerations suggested by experience and observation. *Bryant v. Zimmerman*, 278 U. S. 63; *Bain Peanut Co. v. Pinson*, 282 U. S. 499, 501; *Truax v. Raich*, 239 U. S. 33, 41; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. "The Constitution does not require things which are different to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 147; *Groesaert v. Cleary*, 335 U. S. 464, 466. "* * * Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed a denial of equal protection if any state of facts could be conceived to support it. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 501, and cases cited." *Asbury Hospital v. Cass County*, 326 U. S. 207, 215. See also *Sage Stores Co. v. Kansas*, 323 U. S. 32.

Maryland, in evolving its legislative policy with regard to compensation claims, determined that experience demonstrated that claims involving herniæ differed materially from other classes of cases and required special statutory treatment. This is illustrated by the following language from the opinion of the Court of Appeals of Maryland in *Lloyd v. Webster*, 165 Md. 574, 576:

> "These special requirements in the Maryland statute are similar to those previously adopted in a number of other states, to gain greater assurance that hernias compensated for have in fact resulted from accidental strains. The general provisions of the compensation statutes, it appears, had seemed to work unsatisfactorily, because previous accidental strains were sometimes inferred merely from the development of the hernias, when no strains had been reported or known. Occurrence of a strain would of course, be a fact peculiarly within the knowledge of the workman, and there could be no means of testing the truth of attribution

of the hernias to strains if no strains had been reported at the time. Further, medical testimony had cast considerable doubt on the possibility of traumatic cause of hernias."

See also: *Bethlehem Steel Co. v. Ziegenfuss,* 187 Md. 283, 286-290; *Singleton, Workmen's Compensation in Maryland,* The Johns Hopkins University Press, 1935, pp. 24-25; also opinion of the Court of Appeals in the present case (15, 17).

Special statutory requirements of proof to establish compensability of claims involving herniæ are common to the compensation laws of many states. This is particularly to be noted with regard to the requirement that it be shown that the hernia did not exist before the injury or accident for which compensation is claimed. As stated in *Schneider's Workmen's Compensation* (Permanent Edition), Sec. 1473, Vol. 4, at page 581 et seq.:

> "The Workman's Compensation Acts of 19 states contain specific provisions barring compensation in cases in which a hernia existed in any degree prior to the injury. In states wherein there are no statutory provisions to the contrary, it has been held that a strain resulting in aggravation of a previous hernia constitutes an 'accident' and is compensable."

Annotated to this comment are the references to the pertinent statutory provisions of the various states which bar recovery under such circumstances.

Reasons strikingly similar to those expressed by the Court of Appeals of Maryland for the apparent need for special statutory provisions dealing with hernia claims are set forth in the decisions of the courts of other jurisdictions. For example, *Jordan v. State Commissioner,* 120 W. Va. 142, 144, discussing this problem, states:

> "* * * The reason for the statute is not difficult to perceive. A great many people are afflicted with this ailment, and physical labor of any character tends

> to bring about an acute attack. If all aggravations of hernia were made compensable, it would result in the payment of compensation in many cases where no particular injury was sustained from other than ordinary labor as distinguished from accidents or other unusual occurrences. The legislature evidently had this in mind and presumably intended to draw a line between such hernia as was compensable and such as was not, and used the statute quoted for that purpose * * *"

See also: *O'Brien v. Wise & U. Co.*, 108 Conn. 309; *Arduni v. General Ice Cream Co.*, 123 Conn. 43; *Aniel v. Compensation Commissioner*, 112 W. Va. 645; *Mirific Products Co. v. Industrial Commissioner*, 356 Ill. 645; *Wagner Malleable Iron Co. v. Industrial Commissioner*, 358 Ill. 93.

Such widespread recognition of the special problems arising in connection with claims involving hernia and of the need for special statutory treatment thereof is definite confirmation of the existence of a basis for legislative action. *Daniel v. Family Insurance Co.*, 336 U. S. 220, 223; *Lower Vein Mining Co. v. Industrial Commission*, 255 U. S. 144.

It has been urged by petitioners in this case that, in providing that a pre-existing hernia caused to become aggravated by accident or strain is non-compensable while one so caused to become strangulated is within the scope of coverage afforded by the act, the subsection in question (Article 101, Section 35 (5)) unreasonably and arbitrarily discriminates between essentially similar matters. Petitioners assert that the operation of the statute in this case is to be likened to that before this Court in *Skinner v. Oklahoma*, 316 U. S. 535. This contention, however, is based on the mistaken premise that there is no difference between an "aggravated" hernia and one which is "strangulated".

The groundlessness of the assumption of identity of the two conditions is readily apparent from the definition of the terms employed. "To *aggravate* is etymologically to increase in weight, hence in gravity, severity or intensity. A disease * * * may become aggravated." (*Funk and Wagnalls, New Standard Dictionary,* 1949, Vol. I, p. 53. See also: *The New Century Dictionary,* 1936, Vol. 1, p. 24; *The Oxford English Dictionary,* 1933, Vol. 1, p. 180.) Thus, a condition which is said to be "aggravated" is the same condition in a more severe or intense form. The term is a non-technical one in general usage and, as applied to a physical disability, obviously means no more than an increase in degree of severity rather than a change in essential or intrinsic character. On the other hand, "strangulated" is defined as "constricted to such a degree as to have its circulation cut off; characterized by such constriction; as a strangulated hernia". (*Funk and Wagnalls, New Standard Dictionary,* 1949, Vol. II, p. 2393; see also *The New Century Dictionary,* 1936, Vol. III, p. 1860; *The Oxford English Dictionary,* 1933, Vol. X, p. 1082). The term is a technical medical designation of a definite, characteristic condition (*Gould's Medical Dictionary* (Fourth Edition), p. 602). It is not a mere change of degree, but a change in the character of the pre-existing condition.

The distinction between an "aggravated" hernia and a "strangulated" hernia is further illustrated by the medical commentataries on the subject. As to a claim of aggravation of a hernia, it is said:

> "* * * The claim that a pre-existing hernia had been aggravated by a strain cannot be proved or disproved by physical examination."
>
> *Reed & Emerson, The Relation Between Injury and Disease,* (1938 Ed.), page 290.

On the other hand, in *Kessler, Accidental Injuries, (Second Edition)*, it is said at page 424:

> "Strangulation of an existing hernia is considered a definite accident without any regard to the previous existence of the hernia";

and at page 414:

> "In case of strangulation, with the obvious necessity of surgical interference, Imbert considers the refusal of a man to be operated upon as next to suicide, * * *."

In *Gray's Attorneys' Textbook of Medicine, (Second Edition)*, at page 778, it is said:

> "Strangulation is a grave surgical emergency, necessitating prompt action to relieve the condition * * *."

Thus is it apparent that the terms "aggravated" and "strangulated", as applied to herniæ, are definitely not synonymous or interchangeable as petitioners suggest, but have widely different meanings, the former being general, the latter specific. While the general term "aggravated hernia" may be broad enough to include within its scope the specific condition designated as "strangulated hernia", the converse obviously is not true. Clearly, under the definitions discussed above, not all herniæ which become aggravated in severity or degree are "so strangulated that an immediate operation is necessary", as is required for compensability under Article 101, Section 35 (5).

In dealing with the problem of compensability, the Legislature of Maryland was clearly distinguishing between differing factual situations when it provided that a hernia caused to become "strangulated", requiring an immediate operation, should be compensated and, in effect, excluded a hernia which is merely claimed to have become "aggravated". While difficulty of medical proof or disproof make

it difficult to determine if a simple aggravation has occurred, a strangulation is a readily determinable and gravely critical condition. Thus, the distinction is relevant and appropriate to the legislative purpose that there be "greater assurance that hernias compensated for have in fact resulted from accidental strains". *Lloyd v. Webster*, 165 Md. 574, 576.

The criticism aimed by petitioners at the legislative policy in dealing with cases of this character, when that policy is considered in the light of the considerations leading to its adoption and the factual differences upon which it is based, appears to be aimed at its wisdom or desirability rather than at its constitutional validity. The same observation appears to be equally applicable to the criticism directed at the construction placed upon the statute by judicial decision. This Court has repeatedly declared, however, that whether or not particular legislation may be deemed the most desirable or wise is not the test to be applied in determining its constitutionality. So long as they "do not run afoul of some specific constitutional prohibition * * *", the legislatures of the states have the power to determine and declare matters of policy. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536. See also *Daniel v. Family Insurance Co.*, 336 U.S. 220, 225; *Kotch v. Pilot Commissioners*, 330 U.S. 552. And it is equally well established that the construction placed upon a state statute, dealing with a state matter, by a state court of last resort is not a proper subject for requested review by this Court. *Quong Ham Wah Co. v. Industrial Commission*, 255 U.S. 445, 448; *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 422; *Ward & Gow v. Kunsky*, 259 U.S. 503, 510.

Seeking to illustrate what they assert to be the arbitrary and unreasonable characteristics of the hernia subsection,

petitioners suggest a series of hypothetical situations which, they assert, would not be adequately covered by the statute. "Under our constitutional system, the States in determining the reach and scope of particular legislation need not provide abstract symetry," *Patsone v. Pennsylvania*, 232 U.S. 138, 144; and "* * * the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as it means allow." *Buck v. Bell*, 274 U.S. 200, 208. In any event, hypothetical problems and speculations are irrelevant to a determination of whether petitioners have been denied a constitutionally guaranteed right. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 84-85; *Asbury Hospital v. Cass County*, 326 U.S. 207, 213, 214; *Lower Vein Mining Co. v. Industrial Board*, 255 U.S. 144, 148.

Respondents respectfully submit that it is apparent that the Maryland Legislature, in establishing a classification of hernia claims, and imposing conditions of compensability upon the various types of such cases, was exercising its judgment upon considerations of factual differences and requirements suggested by experience and observation and relevant to a proper legislative purpose.

> "It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patsone v. Pennsylvania*, 232 U.S. 138, 144; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198, 199; *Metropolitan Casualty Insurance v. Brownell*, 294 U.S. 580, 586 * * *."
>
> *Railway Express Agency v. New York*, 336 U.S. 106, 110.

POINT C

Even if the special proviso of the statute were invalidated, petitioner's claim would be barred by the exclusions of the statute.

Petitioners, at page 25 of their brief, apparently concede that there "is no question of the power of the state" to classify claims for compensation for herniæ as in a class separate and apart from claims for other injuries and disabilities under the general provisions of the statute. They assert, however, that equal protection is denied them as the statute distinguishes between claims for pre-existing herniæ caused to strangulate by injury and strain and those caused merely to become aggravated. This is said to constitute an unreasonable discrimination repugnant to the guarantees of the Fourteenth Amendment.

The general language of the second prerequisite of compensability contained in Article 101, Section 35 (5) creates a broad exclusion of all claims for pre-existing herniæ. Immediately following this general provision is the language "* * *; provided that if as the result of an accidental injury * * * or of a strain * * * a pre-existing hernia becomes so strangulated that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply." By thus specially excepting claims involving strangulated herniæ from the operation of this sub-paragraph, the legislature has clearly engrafted a special proviso on the preceding exclusionary language modifying its effect to the extent outlined therein. See *United States v. Morrow*, 266 U. S. 531; *McDonald v. United States*, 279 U. S. 12; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174; *Johns v. Hodges*, 82 Md. 525.

Even if it be assumed that there is contained within this special proviso such an arbitrary and unreasonable discrimination between classes of hernia claims as to constitute a denial of equal protection of the laws, as petitioners assert, the invalidation of this proviso will not serve to render petitioners' claim compensable. The statutory provision rendering strangulated herniæ compensable and removing them from the general exclusion of all pre-existing herniæ is clearly severable from the general exclusionary enactment. Its deletion from the statute obviously would not be contrary to the legislative intent that claims involving pre-existing herniæ shall be non-compensable. Where an invalid portion of statute is thus severable from the rest, the portion which is constitutional remains unaffected by the rejection of the invalid provision. *Frost v. Corporation Commission*, 278 U. S. 515, 525, and cases cited therein; *Maryland Unemployment Compensation Board v. Albrecht*, 183 Md. 87.

Maryland first imposed special conditions for compensability of hernia claims by the adoption of the statute contained in Session Laws of Maryland, 1931, Chapter 363. Under this provision, six prerequisites of compensability were established, the fifth being a requirement that it be shown "that the hernia did not exist before the injury for which compensation is claimed". These requirements were subsequently modified by the provision contained in Session Laws of Maryland, 1935, Chapter 487. The 1935 statute, which is substantially the same as that involved in the present case, reduced the conditions of compensability to three, retained the exclusion as to pre-existing herniæ and added the proviso excepting therefrom claims for strangulated herniæ. Thus, in effect, the proviso in question was added by amendment and, therefore, clearly is severable

from the general provision it modifies. *Frost v. Corporation Commission*, supra; *Reitz v. Measley*, 314 U. S. 33, 39.

If the proviso which removes the bar of the exclusion of claims for pre-existing herniæ from application to such herniæ caused by accident or strain to strangulate were deleted from the statute, the requirement that it be shown "that the hernia did not exist prior to the injury or strain for which compensation is claimed" would remain to exclude, by its express terms, the claim involved in the present case. Therefore, it is respectfully submitted that it has not been shown by petitioners that the invalidation of the proviso of which they complain would afford to them the relief to which they claim to be entitled.

POINT D

Equal protection of the laws is not denied by the abolition of a common law remedy.

Petitioners also assert that, since the effect of the Maryland Act is to bar a right to proceed at common law against the employer for damages on the theory of negligence, (*State, use of Wilson v. North East Fire Brick Co.*, 180 Md. 367, 371), the application of the hernia subsection to bar their claim deprives them of a remedy. It is respectfully submitted that under the agreed facts in this case (4-8) it is perfectly apparent that no basis for such a common law suit is demonstrated or even suggested. Aside from such considerations, however, equal protection of the laws is not denied by the state's abolition of a common law remedy. *New York Central R.R. Co. v. White*, 243 U.S. 188; *Northern Pacific R. Co. v. Meese*, 239 U.S. 614; *Silver v. Silver*, 280 U.S. 118.

VI.

CONCLUSION

As a federal or constitutional question was not seasonably raised or passed upon by the court below, and as there is presented herein no substantial federal or constitutional question, respondents respectfully submit that there is no proper basis for the issuance of a writ of certiorari or review of the decision of the Court of Appeals of Maryland.

Respectfully submitted,

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Baltimore, Maryland,
July 8, 1949.